RECORD AND BRIEF

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In The Supreme Court Of The United States

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,
PETITIONER,

v.

ANZ SECURITIES, INC., ET AL.,
RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMICUS BRIEF OF THE STATES OF WASHINGTON, ALASKA, HAWAII, IDAHO, IOWA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MONTANA, NEW MEXICO, OREGON, PENNSYLVANIA, RHODE ISLAND, AND VIRGINIA IN SUPPORT OF PETITIONER

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INTEREST OF AMICI STATES

States invest billions of dollars of pension funds on behalf of public employees, including teachers, law enforcement officers, firefighters, and judges. They also invest public funds to support myriad civic purposes, including schools, colleges and universities, injured workers, and developmental disability programs. States also sometimes manage state sovereign wealth funds to achieve specific public purposes, including conserving revenue from natural resources, enhancing education and public infrastructure, and providing tax relief to citizens and businesses. The States manage these funds under various legal and fiduciary principles and will take affirmative legal action to protect the public's investments.

State Attorneys General, as the chief legal officers of their States, are on the front lines of protecting the States' investments and enforcing securities laws. State Attorneys General actively litigate on behalf of the States and citizens to expose financial fraud and recover lost assets. This litigation on behalf of beneficiaries and the public plays an essential role in holding corporations accountable for wrongdoing in the financial markets.

Amici States thus have a significant interest in the merits of this case. Continued application of the *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), class action tolling rule to the limitation period found in the Securities Act will ensure continued access to justice, deter corporate abuse, and allow for the efficient recovery of lost

funds for the benefit of the public and beneficiaries alike.

SUMMARY OF ARGUMENT

States and other affected investors rely on *American Pipe* to toll the limitation period for actions under the Securities Act. *American Pipe* creates a consistent rule of law that protects the rights of all and promotes efficient class action litigation. The Second Circuit's rejection of this rule for class members facing Section 13's limitation period harms the States and the public.

The Second Circuit's decision undermines the purposes of securities laws, and impairs enforcement by the States and others. Vigorous public *and* private enforcement of the securities laws deters fraud and contributes to healthy financial markets. The Second Circuit's decision weakens private securities litigation, and thus puts a significant burden on States and other public regulators seeking to protect the public. It directly impairs the deterrence and compensation goals of the securities laws by allowing violators to escape liability, and leaving injured investors without recourse, simply because of the passage of time during the course of securities litigation.

The Second Circuit's decision also imposes needless administrative and fiscal burdens on the States and judicial system. Without the *American Pipe* rule, the States can no longer be assured that class action representation protects their interests. States must unnecessarily expend resources monitoring and assessing every securities class action to predict whether continued participation in

the class poses a risk to their claims. To preserve their rights, States will also be forced to take preventative action in the form of premature intervention or opt-out litigation. Neither comports with the purpose and protections of class litigation, and both waste valuable public resources.

Finally, the Second Circuit's decision diminishes the value of aggregate securities litigation and imposes significant barriers to individual access to justice. Rather than encouraging the efficient accumulation and resolution of securities claims, the decision leads to duplicative, unnecessary litigation. It encourages sophisticated class members to file early intervention motions to protect their claims from dismissal, while encouraging others to file separate actions. At the same time, it leaves other smaller, less sophisticated investors without any means to protect their rights if class certification fails or their claims are otherwise dismissed.

This Court must reverse to rectify these pointless encumbrances and ensure continued access to justice for all.

ARGUMENT

A. The Second Circuit's Rejection of *American Pipe* Impairs the Securities Laws

Under *American Pipe*, the filing of a class action complaint temporarily suspends the applicable limitation period for all class members "who would have been parties had the suit been permitted to continue as a class action." *American*

Pipe, 414 U.S. at 554. This provides a consistent rule of law that recognizes both the practicality and the necessity of tolling a limitation period to protect the rights of class members, and that promotes efficiency and economy in class action litigation. *Id.* at 553-56. The Second Circuit's rejection of this rule for the limitation period in Section 13 undermines the purpose of the securities laws, and impairs comprehensive enforcement of them.

States enforce securities laws in tandem with the federal government through regulatory and criminal actions. *See, e.g.*, 15 U.S.C. § 77r(c)(1) (allowing States to investigate and bring state enforcement actions with respect to "fraud or deceit" in connection with securities transactions). More frequently, states and private citizens enforce the laws by filing and participating in civil securities class actions. These different enforcement actions work together as a "three-legged stool" to hold securities violators accountable and to ensure victims of security fraud are compensated. *See* Melanie Gray, Vanessa Chandis, & Kristen M. Echemendia, *Striking the Right Balance: Public versus Private Enforcement Laws—What Will We Learn From This Financial Meltdown?* 60 Syracuse L. Rev. 449, 449-50 (2010).

Vigorous enforcement of the securities laws deters fraud and contributes to healthy financial markets. James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 100 Cal. L. Rev. 115, 128 (2012). It also furthers Congress' goals of protecting investors, promoting honesty and fair dealing, and compensating victims. *Cf. Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195

(1976) (recapping congressional purpose for enacting the Securities Acts of 1933 and 1934). This Court has long recognized that private actions are an "effective weapon in the enforcement of securities laws" and a "necessary supplement" to public enforcement actions. *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)). It is thus the combination of public and private enforcement that "together provide a means for defrauded investors to recover damages and a powerful deterrent against violations of the securities laws." S. Rep. No. 104-98, at 8, *reprinted in* 1995 U.S.C.C.A.N. 679, 687; *see also Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 174 n.10 (2008) (Stevens, J., dissenting) (quoting same). The Second Circuit's rejection of *American Pipe* tolling in the face of Section 13's limitation period impairs these important enforcement mechanisms and regulatory goals by undercutting the important third leg of the enforcement stool—private securities class litigation.

Prior to the Second Circuit's decisions in *Police & Fire Retirement System of Detroit v. IndyMac MBS, Inc.* (*IndyMac*), 721 F.3d 95 (2d Cir. 2013), and this case, the commencement of a securities fraud class action protected the interests of *all* purported members of the class *until* class certification was resolved. *American Pipe*, 414 U.S. at 554; *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354-55 (1983). States could therefore preserve valuable resources and be selective in their enforcement actions knowing that rights of affected investors were protected through private class litigation. This assurance is no longer true in the face of the Second

Circuit's decisions, and puts an unsustainable burden on States and other public regulators.

While States and other public entities may increase their regulatory and litigation efforts to cover the gap, they simply do not have the resources to police the entire securities market and hold every violator accountable. Without the necessary supplement of private securities litigation to protect the interests of all class members, the enforcement value of the securities laws is impaired. Would-be perpetrators will have less of an incentive to avoid fraudulent behavior when the risk of enforcement is lowered, or when they may be required to compensate only a small share of investors' losses. Likewise, making private enforcement more difficult makes it more likely that victims of securities fraud will be left without compensatory recourse.

The Second Circuit has imposed unnecessary barriers to achieving the securities laws' purposes and goals. As described in the Petitioner's brief, the Second Circuit's rejection of *American Pipe* tolling in this context is not mandated by any case law or statute. It also contravenes longstanding application of the rule to protect the public's interests. In contrast, applying *American Pipe* furthers the deterrence and compensation objectives of the securities laws. It provides stability to the States, institutional investors, and individual enforcement efforts. It also promotes justice by ensuring that violators do not escape liability and injured investors are left without compensation simply because of the passage of time.

B. The Second Circuit's Rule Creates Barriers to the States' Ability to Protect the Public Interest

The *American Pipe* tolling rule also helps the States protect their public investments while efficiently managing their fiduciary responsibilities. States, through designated agencies, act as trustees or have trustee-like duties over the assets they manage. As fiduciaries, the States have a duty to take reasonable steps to enforce claims associated with assets they manage. *Restatement (Second) of Trusts* § 177 (1959). States, therefore, frequently participate in securities litigation, often serving as lead plaintiffs or as passive members of private class actions. Rejecting application of *American Pipe* for the limitation period in the securities act would impose needless administrative and fiscal burdens on the States.

Without *American Pipe*, the States can no longer be assured that participation in class actions will protect their interests. Instead, the States must evaluate each case to assess the risk of dismissal or class certification failure. This requires in-depth analysis of the veracity of the pleadings and the foundations of each claim in an attempt to predict whether the class will survive. It also requires analyzing myriad possible defenses and theories that could defeat the class action, including safe harbor rules, reliance, and issues of commonality or typicality. States, however, are often at a disadvantage in evaluating these issues. Third parties often have facts that create a risk of dismissal, but which are unknown to the States. Given the risk of inaccuracy in predicting whether a

class will survive, the States would be placed in the untenable position of taking affirmative action in the form of premature intervention or opt-out litigation to protect their interests, or risk losing their claims altogether. This imposes significant and unnecessary burdens on governments that already face budgetary and competing demands for resources.

The facts of this case and *IndyMac* highlight the burdens imposed on States, as well as how the Second Circuit distorts the rules and procedures for class actions. For instance, under Fed. R. Civ. P. 23, class members may participate or withdraw from a class action until they receive notice of the opt-out deadline. *See American Pipe*, 414 U.S. at 549. When CalPERS exercised these rights by opting-out of a proposed class settlement before the court-ordered deadline and filing its own action, the district court dismissed it as untimely under Section 13's limitation period and the Second Circuit affirmed. *In re Lehman Bros. Sec. & ERISA Litig.*, 655 Fed. App'x 13, 2016 WL 3648259 (2d Cir. July 8, 2016).[1]

Rule 23 also permits members of a class to intervene to protect their interests, either because they do not believe they are being fairly represented by the named parties or the class is subject to dismissal. Charles A. Wright et al., 7B *Fed. Prac. & Proc. Civ.* § 1793, Westlaw (3d ed. & Suppl. Jan. 2017). *IndyMac* involved such a scenario. In that case, two public institutional investors brought

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[1] CalPERS' situation is common in the Second Circuit. *See SRM Glob. Master Fund Ltd. P'ship v. Bear Stearns Cos. L.L.C.*, 829 F.3d 173 (2d Cir. 2016) (dismissing under similar fact pattern); *Kuwait Inv. Office v. Am. Int'l Grp., Inc.*, 128 F. Supp. 3d 792 (S.D.N.Y. 2015) (same).

separate securities class actions. *IndyMac*, 721 F.3d at 102. The district court consolidated the two actions and appointed Wyoming as lead plaintiff. *Id.* Wyoming then filed an amended consolidated class complaint raising claims on behalf of itself and other asserted class members. *Id.* at 103; *see also In re IndyMac Mortgage-Backed Sec. Litig.*, 793 F. Supp. 2d 637, 641 (S.D.N.Y. 2011).

One year later and after the limitation period had run, the district court dismissed for lack of standing all of the claims in the amended complaint arising from the offering of securities not purchased by Wyoming. *IndyMac*, 721 F.3d at 103. When six state and city entities, including one of the original plaintiffs in the consolidated action, moved to intervene in order to cure this defect, the district court denied the motions, finding that *American Pipe* did not toll their renewed claims in the face of Section 13's limitation period. *Id.* at 103.

As evidenced by these circumstances, analyzing and deciphering all of the countless factors that could lead to the failure of a particular class action is a substantial burden that comes with a significant risk of error. States and other putative class members should not be forced to bear these risks, especially when Rule 23 was meant to alleviate this burden for purported class members. *Cf. American Pipe*, 414 U.S. at 551-52 ("Rule 23 is not designed to afford class action representation only to those who are active participants in or even aware of the proceedings in the suit . . . ."). Indeed, *American Pipe* itself relieved class members of the very burdens that the Second Circuit's decisions now impose:

> "Not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case." *American Pipe*, 414 U.S. at 552.

Forcing States to monitor the limitation period in all securities class action matters and evaluate the risk of failure will all but eliminate the protections of Rule 23 and *American Pipe* in this regard.

The sheer number of securities class actions amplifies the States' burden. From 2011 to 2015, an average of 221 securities class actions were filed each year. Stephan Boettrich & Svetlana Starkh, NERA Econ. Consulting, *Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review* (Jan. 23, 2017), at 2, http://www.nera.com/publications/archive/2017/recent-trends-in-securities-class-action-litigation--2016-full-y.html.html. In 2016, the number of filings reached a record number of 270. *Id.* at 3; Cornerstone Research, *Securities Class Action Filings: 2016 in Review* (2017), at 5-6, https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2016-YIR. While increased merger and acquisition objection filings contributed to this record, traditional securities actions were 11 percent higher in 2016 than in 2015. *Securities Class Action Filings* at 5. In comparison to the number of new filings each year, the number of pending cases is staggering. For example, from 2011 to 2016, the number of ongoing cases went up from 533 to 674. *Recent Trends* at 26. The resources needed to

evaluate that number of potentially relevant cases and the limitation period within each case places an unnecessary and heavy burden on the States.

The Second Circuit's decisions unreasonably increase costs, complexity, and risk for States seeking to responsibly protect beneficiaries and the public funds entrusted to them, and should be reversed.

C. The Second Circuit's Rule Undermines the Value of Securities Class Actions

One way for States to protect the public and beneficiaries from time-barred claims is to file early duplicative litigation. Such recourse strays from the aggregative benefits of securities litigation. It also substantially increases the overall cost of litigation for the States, defendants, and the courts. And, it should be unnecessary.

Securities fraud claims have long been subject to aggregation. Aggregation benefits the public by preventing violators from escaping liability simply because individual investors' damages are too small in comparison with the expense of litigation. Michael J. Kaufman & John M. Wunderlich, *The Judicial Access Barriers to Remedies for Securities Fraud*, 75 Law & Contemp. Probs. 55, 59 (2012). It benefits the judicial system by consolidating similar actions to avoid duplication and create efficiencies. William B. Rubenstein et al., *Newburg on Class Actions* § 4:47 (5th ed. 2016). Aggregation in securities actions also benefits defendants in that they can achieve finality over a large number of potential claims, thus limiting their financial liability and costs. *Civil Procedure—Class Actions—Second Circuit Holds*

that American Pipe Class Action Tolling Doctrine Does Not Apply to Statute of Repose In Securities Act of 1933: Police & Fire Retirement System of Detroit v. IndyMac MBS, Inc., 721 F.3d 95 (2d Cir. 2013), 127 Harv. L. Rev. 1501, 1507 n.54 (2014).

Rule 23 and the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. 104-67 (Dec. 22, 1995), likewise contribute to the aggregate nature of securities claims by "funnel[ing] as many claims as possible arising out of a given fraud into a single action managed by a single institutional-investor plaintiff and litigated by a single law firm." *Civil Procedure—Class Actions* at 1508. *American Pipe*, too, promotes aggregation by protecting putative class members' claims until class certification is resolved or the opt-out deadline passes, thus incentivizing class members to await resolution. *American Pipe*, 414 U.S. at 550-52. The Second Circuit's rule, however, unravels all of these benefits by encouraging premature intervention and duplicative litigation.

As evidenced by the facts of this case and *IndyMac*, the risk of barred claims in the face of statutes of repose is significant. Both Rule 23 and the PSLRA contemplate that decisions regarding appointment of a single named plaintiff and class certification will be decided early in the litigation. *See* 15 U.S.C. § 78u-4(3); Rule 23(c)(1)(A). However, myriad factors can delay resolution of these issues, including the timing of consolidation, the complexity of the case, and whether defendants engage in class discovery or extensive motions practice. Charles A. Wright et al., 7AA *Fed. Prac. & Proc. Civ.* § 1787.3, Westlaw (3d ed. & Suppl. Jan. 2017). Delays create

significant risks for putative class members, risks that weigh heavily on States tasked with the responsibility of protecting public and beneficiary funds from losses.

A rational response to these risks created by the Second Circuit is for States to initiate parallel actions or to file motions to intervene in meritorious cases. In the *Petrobras Securities Litigation*, for example, thirty-two institutional investors, including five state entities, chose to file separate actions. *See, e.g.*, *New York City Emp. Ret. Sys. et al. v. Petroleo Brasileiro S.A.-Petrobras et al.*, No. 1:15-CV-02192 (S.D.N.Y. filed Mar. 23, 2015); *Washington State Inv. Bd. v. Petroleo Brasileiro S.A.-Petrobras et al.*, No. 1:15-cv-03923 (S.D.N.Y. filed Apr. 10, 2015). Rather than encouraging the efficient aggregation and resolution of the claims, the Second Circuit has encouraged duplicative and potentially unnecessary litigation. It causes putative class members to file early intervention motions to protect claims from possible dismissal while causing others to file separate litigation to protect their rights.

Although these actions mitigate the risk of time-barred claims, they are not without cost. Litigating complex securities matters requires allocating significant resources by public entities. The increased devotion of resources and costs does not, however, just fall on public entities that choose separate litigation. It also falls on the courts and the defendants who must respond. The Second Circuit's decisions promote duplicative litigation, waste valuable judicial resources, and undermine the efficiencies associated with aggregate litigation.

D. The Second Circuit's Rule Impedes Individual Access to Justice

Access to justice plays an imperative role in class actions. Securities class actions provide access to the courts for those with small monetary claims that could not otherwise be pursued. "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)). Although the Second Circuit's rule incentivize large, sophisticated investors to protect their claims by filing separate, duplicative litigation, small investors are left unprotected. Small investors typically lack the means to protect their investments. Millions of shareholders hold securities in brokerage accounts throughout the nation. Millions more hold securities in personal 401(k), deferred compensation, and other pension funds. The States have a fundamental interest in ensuring that these individuals have a pathway to justice in the face of securities fraud.

Small claim holders will be denied access to the courts because the economies do not justify protective litigation, and because they lack the means to monitor or intervene in litigation that affects their claims. Importantly, even large investors like the States may hold relatively small investments as part of their diversified portfolios, placing them in the same position as small claimants in securities litigation. Access to justice will be lost

not just for the States, but also those most affected by the loss—the public.

The *American Pipe* rule helps protect access to the courts. Reversing the Second Circuit's decision, will help maintain a fair and efficient process that allows small claim holders a pathway to adjudicate meritorious claims.

CONCLUSION

The Court should reverse the Second Circuit and affirm *American Pipe* tolling for securities class actions. Doing so ensures continued access to justice, deters securities fraud, and benefits the states and the public.

RESPECTFULLY SUBMITTED.

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